Petition

Office - Supreme Court, U.S.
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MAR 15 1982
ALEXANDER L. STEVAS
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81-1699

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT EUGENE EARLY
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the court's refusal to allow the testimony of Petitioner's only proffered witness deny him his right to present witnesses on his behalf secured by the Sixth Amendment to the United States Constitution and deny him due process of the law as required by the Fifth Amendment to the United States Constitution?

PARTIES

The parties in the United States District Court for the Eastern District of Virginia were the United States of America, plaintiff and Robert Eugene Early and Nancy Anne O'Neal, defendants. Ms. O'Neal is not a party to the petition for writ of certiorari in this Court.

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JURISDICTION

Petitioner was convicted in the United States District Court for the Eastern District of Virginia, of one count of wire fraud in violation of Title 18 United States Code sections 1343 and 2. The judgment and commitment order was entered on May 16, 1980. A timely appeal was filed in the United States Court of Appeals for the Fourth Circuit. On December 30, 1981, the Court of Appeals affirmed Petitioner's conviction. On January 19, 1982 Petitioner filed a motion for leave to file, out of time, a petition for rehearing. Said motion was granted, extending to February 5, 1982 the time within which to file the petition for rehearing. Petitioner timely filed a petition for rehearing on Febru-

ary 5, 1982. By Order dated March 4, 1982 the petition for rehearing was denied, as was a request for a stay of mandate and continuance on bail. This Court has statutory authority to review the judgment by Certiorari pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a violation of petitioner's rights secured by Amendments V and VI, United States Constitution, which read as follows:

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal offense to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. (Emphasis added)

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis added)

STATEMENT OF THE CASE

Petitioner was charged in a thirteen count indictment with one count of con-

spiracy to commit mail and wire fraud in violation of 18 U.S.C. sections 1341 and 1343 as well as twelve counts charging substantive violations of those sections. The charges stem from his operation of a business which contracted to service small household appliances. The indictment charged not only that Early accepted payment, either by check or credit card charges, for services he never intended to perform, but also that the business was a scam through which he fraudulently obtained credit card numbers of individuals who did not desire service contracts.

The government contended throughout the trial that there were several acts of fraud for which Early was charged, not limited to those dealing with the alleged scheme of obtaining the credit card

numbers.

"Mr. Aronica: Your Honor, the government contends that these defendants did not intend and did not provide the services they advertised.

"The Court: That's correct, all right."

* * *

"Mr. Aronica: It goes to the intent.

"The Court: Intent of what?

"Mr. Aronica: Intent to perpetuate this scheme and then leave town."

* * *

"The Court: But he's not charged with obtaining merchandise on false pretense to sell to somebody else. The scheme is to sell these contracts, isn't it?

"Mr. Aronica: To sell the contracts and--

"The Court: (Interposing) Isn't that the basic scheme?

"Mr. Aronica: And to defraud the public..."
Tr. April 15, 1980, p. 85.

The court admonished the prosecutor at one point that by bringing in such additional evidence to show intent, he was opening up for defendants' argument that there was a legitimate business purpose behind the entire operation (Tr. April 15, 1980, p. 86), but nevertheless allowed the government to introduce evidence in support of its theory that the scheme was an overall scheme to defraud the public. Based on this theory, the government introduced evidence, for example, that Early owed money to the telephone company and media advertising companies to prove the type of overall fraudulent activity charged in its "catchall" indictment. (Tr. April 16, 1980, p. 280). The government also introduced the testimony of "customer"

witnesses not named in the indictment, who had not lost any money in their dealings with Early, obviously to reinforce its theory that Early had an intent to cheat the general public.

As the trial progressed, the trial judge discerned what he believed the fraud to be:

> "Mr. Stevens: The indictment charges a scheme to defraud.
>
> "The Court: And the scheme to defraud is the credit cards.
>
> "Mr. Stevens: That's an element of how it was carried out.
>
> "The Court: No, that isn't an element. That's the scheme and I'll tell the jury that it was. There's no argument about it."
> (Tr. April 16, 1980, p. 313).

Therefore he refused to allow the testimony of Early's only proffered witness, Robert L. Wilson, who would have testi-

fied that Early had refused to enter into a large and profitable service contract because Early did not have the equipment to service certain appliances specifically requested by the potential customer.

> "The Court: So, if it had nothing to do with the credit card, it's a different type of sale. This is a sale by credit cards."
> Tr. April 16, 1980, p. 313.

When counsel for Early argued that if the Court were going to adopt such a narrow view of the case it must dismiss all of the counts not dealing with credit cards and must adequately instruct the jury to disregard the bulk of the government's case, i.e. that part of the testimony dealing with the general and overall scheme to defraud the public, the court promised to do so at the end of the case:

"That's the scheme and I'll tell the jury..." (Tr. April 16, 1980, p. 313). Yet the court sent two counts to the jury in which the "customers" paid by check with the obvious implication that Early was being charged with obtaining money by false pretenses, after it had steadfastly refused to allow Early to present his only witness, who would have negated the carefully built impression of fraudulent and evil intent, on the basis that the only fraud involved was the credit card "scheme."

By adopting this see-saw approach to the case, the Court denied Early his constitutional right to call witnesses on his own behalf, as secured by the Sixth Amendment to the United States Constitution, and his right to due pro-

cess of law as guaranteed by the Fifth Amendment to the Constitution.

ARGUMENT

Petitioner Was Denied Due Process of Law and the Right To Present Witnesses in His Favor When the Trial Court Failed to Allow the Testimony of Petitioner's Only Proffered Defense Witness, in Violation of the Fifth and Sixth Amendments to the United States Constitution.

Petitioner was convicted in violation of two principal constitutional mandates. He was denied due process, in direct contravention of the Fifth Amendment, and was prevented from using a witness to rebut the government's presentation against him, in violation of the Sixth Amendment.

Fifth Amendment -- Due Process

Perhaps the best way to describe

"due process of law" is that the procedure by which someone is convicted must be fundamentally fair. Galvan v. Press, 347 U.S. 522, 530 (1954). Here, fairness to the defendant below was ignored by the District Judge in his conduct of the trial. Early and his co-defendant were indicted in a multi-count indictment charging conspiracy and fraud. They came to the trial prepared to rebut the charges as presented by the grand jury. Likewise, the prosecutor came hoping to present evidence that the defendants were engaged in an overall scheme to defraud the general public. The Court, however, engaged in its characteristic fashion of re-directing the prosecutor's case. See United States v. Hickman, 592 F.2d 931 (6th Cir. 1979).

It was difficult enough to engage in battle with an able prosecutor as adversary -- the District judge cast himself as advocate of a theory of the case that neither the prosecutor nor defense expected. This muddled the case for both parties and, more importantly, befuddled the jury. The judge concluded early on in the trial that he had the case all figured out, and that much of the prosecution's case was either redundant or superfluous. Thus, he suggested on several occasions that the presecutor move away from certain areas and speed the case along. In his attempt at efficiency, however, the court overstepped its bounds of being an active trial referee. Hickman, supra. If the Court was going to limit the case, it

should have done so at the outset. If it was going to do so later on, it had a duty to properly instruct the jury that the bulk of the prosecutor's case was not probative of the counts of the indictment being submitted. Such is the requirement of due process, a trial which on balance represents fundamental fairness.

The court chose, instead, either intentionally or through oversight, to compound the error and confusion by allowing into evidence all the government's evidence on general fraudulent intent, denying petitioner the right to call his only proffered witness to rebut the evidence, promissing the defense attorney that he would correct this error, submitting one and possibly two counts to the jury that were mirror

charges to the proffered but disallowed exculpatory evidence and then failing to sort out for the jury this judicially created morass.

Justice, if any there be, must not only occur, it must be perceived. Surely when a person is charged with a specific intent to commit a fraud, he should be given some latitude in the defense he proffers. To hold this petitioner to as narrow view of the case as the trial court did does not mirror justice, it mocks it.

Due process commands that a criminal defendant be given a fair trial. The trial court's chameleonic pronouncements of the theory of the case denied petitioner due process of the law in violation of the Fifth Amendment.

Sixth Amendment

Inherent in the Sixth Amendment's guarantee of compulsory process for witnesses, is the belief that a defendant should have the right to call witnesses in his behalf. Washington v. Texas, 388 U.S. 14, 23 (1967); United States v. Moreno, 536 F.2d. 1042, 1046 (5th Cir. 1976). This right must, of course, be monitored by the trial judge, whose decision will ordinarily not be disturbed unless it appears that the denial is of such a magnitude as to violate this constitutional guarantee. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). United States v. Hickman, supra.

By the time the government had finished the case, the jury had received substantial evidence of general fraudu-

lent intent. Petitioner's only proffered witness was prepared to testify regarding a contemporaneous transaction which would have assuaged the impression of general fraudulent intent to which the jury had been exposed.

The witness' testimony was not proffered to prove only that the defendants below were engaged in a legitimate business enterprise, as the Court of Appeals misapprehended. (See Opinion, Appendix B). The evidence proffered was that during the same time the defendants below were dealing with individuals who called in over the phone, one at a time, they had an opportunity to make a sale to an entire condominium, approximately 300 people, and to gross possibly $60,000 in sales. If the intention of

the defendants below had been to swindle people, that is, to take their money and not provide a legitimate service in return, as the government tried numerous times to prove through several witnesses, then was it not a proper piece of probative evidence for the jury to hear that the defendants had turned down a "sweetheart" deal which the proffered witness had lined up for them? If all they (defendants below) had had to do to close the contract was agree to cover air conditioners and give a discount, since, according to the government's theory, they were not going to provide any service anyway, would not persons intent on swindling (general fraudulent intent) make such an agreement, grab their money and make a getaway? The fact that they

were offered such a golden opportunity and turned it down was not just evidence to prove that they were engaged in a legitimate business enterprise. Rather, and more importantly, it was evidence to rebut the alleged intent to defraud. This distinction is crucial because the jury was instructed to consider whether specific intent was proved by inferences legitimately drawn from all the facts and circumstances of the case (the "base"). As the court instructed the jury:

> "[I]ntent ordinarily may not be proved directly but [sic] there is no way of fathoming or scrutinizing the operations of a human mind, but you may infer a defendant's intent from the surrounding circumstances..." Tr. April 17, 1980, p. 14.

Sometimes the only way to prove a positive is to show a restraint to do

something negative when the opportunity is presented. The government had introduced evidence of obtaining money by false pretenses, which evidence became part of the "base" from which inferences could be drawn. If the jury was going to be allowed to use the government's evidence in this area as part of this "base," then the defendants below were entitled to put in their evidence that offset this portion of the government's case. This is why the witness's testimony was being proffered and why it should have been allowed.

Courts of Appeals in several Circuits have addressed this question and resolved it in favor of admissibility. See United States v. Garvin, 565 F.2d 519 (8th Cir. 1977). United States v. Shavin,

287 F.2d 647 (7th Cir. 1961), Washington v. United States, 64 F.2d 936 (7th Cir. 1933). United States v. McClure, 546 F.2d 670 (5th Cir. 1977); Watkins v. United States, 287 F.2d 932 (1st Cir. 1961). As stated by the Court in McClure:

> His (defendant's) right to present a vigorous defense required the admission of the proffered testimony. The fact that it referred exclusively to threats made by Carroll after the sales by appellant affects its weight but not admissibility.
>
> We intimate no opinion as to the credibility of appellant's entrapment defense. We decide only that a jury could not properly convict him absent the opportunity to hear the proffered testimony bearing upon his theory of defense and weight its credibility along with the other evidence in the case. 546 F.2d at 672-73 (emphasis added).

The trial court declared the wit-

nesses' testimony inadmissible as not relevant to the credit card scheme, yet failed to limit the counts that were submitted to the jury to credit card transactions or to instruct the jury that the only "scheme" was the credit card scheme. As stated by the 6th Circuit in United States v. Carabbia, 381 F.2d 133 at 139 (6th Cir. 1967)

> ...It is his [trial judge's] duty to see that the issues are not obscured and that the testimony is not misunderstood...

The Court here, however, did the reverse, causing the jury to receive a patch work of issues, evidence and charges - without the defendant's version either provided through written testimony or clarified by the instructions. This is the sort of "interference with the

presentation of counsel"...which has made a "mockery of (this) defendant's right to a fair trial...United States v. Hickman, supra at 934. The proffered testimony, was clearly relevant to the case as submitted to the jury, and its exclusion was a violation of Petitioner's constitutional right to have witnesses in his favor.

CONCLUSION

It is respectfully submitted that certiorari should be granted to review the trial court's exclusion of the proffered testimony and the Court of Appeals' holding which in in clear conflict with the holdings of Courts of Appeals in at least four other circuits.

Respectfully submitted,

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Counsel for Petitioner

March 15, 1982

Appendix

Appendix A

United States District Court
for the Eastern District of Virginia
Alexandria Division

United States of America vs.
Robert Eugene Early
Docket No. CR. 80-37A

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date - - - - - 5 16 80

* * *

With counsel (Jack B. Stevens, Esq.)

* * *

There being a verdict of ...guilty.

Defendant has been convicted as charged of the offense(s) of T. 18 U.S.C. 1343 and 2 - Wire Fraud - Ct. 7

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court, adjudged the defendant guilty as charged and convicted and ordered that: The defendant

is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for ... the maximum period of five (5) years.

Defendant was found not guilty on counts 2, 3, 4, 9, 10, 11 and 12.

Counts 1, 5, 6, 8 and 13 were dismissed.

* * *

signed by S/Oren R. Lewis
U. S. District Judge
Date 5/16/80

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

UNPUBLISHED No. 80-5082

United States of America,

v.

Robert Eugene Early,

* * *

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, Senior District Judge.

Argued December 11, 1981
Decided December 30, 1981

Before WINTER, Chief Judge, PHILLIPS and MURNAGHAN, Circuit Judges.

* * *

PER CURIAM:

Convicted of one count of conspiracy to comit wire fraud in violation of 18 U.S.C. §1343, defendants Robert Eugene Early and Nancy Anne O'Neal appeal. They contend that the evidence was legally insufficient to sustain their convictions and that the district court committed reversible error in excluding evidence of a transaction reflecting that they were engaged in a legitimate business enterprise rather than a scheme to defraud. We see no merit in their contentions and we affirm.

From our review of the record and consideration of the arguments, both oral and written, we are satisfied that the evidence was legally sufficient to show that defendants defrauded Debra Valles as charged. Ms. Valles testified that defendants tricked her into giving them her credit card number when she responded by telephone to a television commercial advertising an appliance repair contract from Appliance Underwriters, defendant's company. She further testified that defendants charged her account without her having purchased a contract or authorized the charge. A co-conspirator testified as to the modus operandi by which defendants tricked Ms. Valles into disclosing her credit card number.

The fact that the jury acquitted defendants on similar charges alleged in the multi-count indictment does not constitute a finding that the transaction with Ms. Valles was not fraudulent. See Dunn v. United States, 284 U.S. 390, 392-94 (1932). We read and understand our decision in United States v. Bethea, 483 F.2d 1024 (4 Cir. 1973), as inapposite.

In our view the legitimate transaction which defendants sought to prove was so dissimilar to the transaction for which they were convicted as to render the proffered evidence inadmissable.

AFFIRMED

Appendix C

Clerk's Office
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

February 2, 1982

William B. Cummings, Esq.
P. O. Box 1177
Alexandria, VA 22313

Re: No. 80-5082, et al, USA v.
Robert E. Early

Dear Mr. Cummings:

Per telephone conversation with Mr. Layne of this office, the court will allow you to file a petition for rehearing out-of-time provided the petition is filed in this office by February 5, 1982.

Sincerely yours,

WILLIAM K. SLATE, II

By: s/Carol R. Lemon
Chief Deputy Clerk

CRL/epb
cc: Jack B. Stevens, Esq.
Joseph J. Aronica, Esq.

Appendix D

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 80-5082

United States of America, Appellee,

versus

Robert Eugene Early, Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing, stay of mandate and continuance of bail pending certiorari, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

IT IS FURTHER ORDERED that the motion for a stay of mandate and continuance of bail pending certiorari is DENIED.

Entered at the direction of Chief Judge Winter for a panel consisting of

Chief Judge Winter, Judge Phillips, and Judge Murnaghan.

For the Court,

/s/ William K. Slate, II

CLERK

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U. S. Court of Appeals
Fourth Circuit

Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT EUGENE EARLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in excluding evidence proffered by the defendant to show that he passed up an opportunity to enter into a scheme to defraud that had nothing to do with the credit card scheme to defraud on which he was convicted.

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ROBERT EUGENE EARLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1981, and a petition for rehearing was denied on March 4, 1982 (Pet. App. D-1 to D-2). The petition for a writ of certiorari was filed on March 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of wire fraud (Count 7), in violation of

18 U.S.C. 1343 and 2.[1] He was sentenced to five years' imprisonment (Pet. App. A-1 to A-2). The court of appeals affirmed (*id.* at B-1 to B-3).

The evidence at trial showed that in 1978 petitioner and his co-defendant, Nancy O'Neal,[2] established Appliance Underwriters, an enterprise that offered service contracts that purported to guarantee, for a period of one or two years, the repair or replacement of any appliances owned by the subscriber to the service (J.A. 42-45, 48-50, 71-72, 98, 346-350). Appliance Underwriters promoted its service contracts through newspaper displays, television commercials, mailed circulars, and door to door sales (J.A. 52, 60-63, 65-69, 134-136, 224-225, 228-229). The advertisements represented that only a limited number of contracts would be available in each section of the Washington, D.C. metropolitan area and advised potential customers to call a certain telephone number in order to obtain a contract (J.A. 53-54, 224-225, 239, 255-256, 261).

The designated telephone number rang in the apartment of petitioner and O'Neal and at an answering service (J.A. 54-55). Either petitioner, O'Neal or Ronald Moffitt, the prosecution's chief witness,[3] would answer or return the call and tell the potential customer that the repair contracts

---

[1]Petitioner was acquitted on two counts of mail fraud and five counts of wire fraud. In addition, the court dismissed a conspiracy count and four other mail or wire fraud counts (Pet. App. A-2; J.A. 7-17) ("J.A." refers to the joint appendix filed in the court of appeals).

[2]The jury also found O'Neal guilty only on Count 7. She was committed to the custody of the Attorney General for treatment and supervision, pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5010(b) (J.A. 36).

[3]Moffitt was charged in the same indictment as petitioner and O'Neal (J.A. 7-17). He testified pursuant to an agreement with the government by which he pled not guilty to the charges in the indictment and pled guilty to a lesser included misdemeanor offense (J.A. 45-47, 496-497).

would not begin immediately, but that one could be "reserved" at a low, introductory price. Petitioner, O'Neal or Moffitt would then attempt to obtain a credit card number from the caller for the purported purposes of identification, conducting a credit check or "reserving" a contract (J.A. 167-169, 202, 214, 217-218, 359-361, 363, 398, 457). When petitioner and O'Neal decided they were not obtaining enough credit card numbers by this method, petitioner devised a "contest," whereby Moffitt, and sometimes petitioner, would call individuals and tell them they could win a prize if their credit card number matched a certain undisclosed number (J.A. 79-82, 88, 169-170, 230-232, 239, 256, 395-397). In fact, whenever a credit card number was obtained, for whatever purported purpose—identification, credit check, reserving a contract, participating in the "contest" or the actual purchase of a contract—the cardholder's account would be charged and the proceeds would be deposited in Appliance Underwriters' bank account (J.A. 82-83, 171-173, 203, 220-221, 233, 241, 247-248, 257, 385, 396). In late April 1979, petitioner and O'Neal left the Washington, D.C. area without paying rents, wages, and other monies owed to Appliance Underwriters' creditors and employees (J.A. 125-126, 189-190, 193, 195, 197-198, 280-281, 287-288, 297, 424).

In his defense, petitioner proffered the testimony of Robert Wilson. Out of the jury's presence, Wilson stated that petitioner had asked him to negotiate with representatives of a condominium building for petitioner to provide a repair service contract covering the appliances of the condominium owners. According to Wilson, when he reported back to petitioner the details of his discussion with the condominium representatives, petitioner told Wilson not to pursue the matter further (J.A. 332-334). After hearing this proffer, the district judge excluded Wilson's testimony on the ground that the potential deal with the representatives

of the condominium building was not a credit card sale and therefore was irrelevant (J.A. 343-344).

The court of appeals affirmed (Pet. App. B-1 to B-3), holding (*id.* at B-3) that "the legitimate transaction which defendants sought to prove was so dissimilar to the transaction for which they were convicted as to render the proffered evidence inadmissible."

ARGUMENT

Petitioner contends that the district court erred in excluding Wilson's testimony because that testimony would have rebutted evidence that he was engaged in a scheme to defraud. As the court of appeals correctly held, however, the potential condominium contract was "so dissimilar" to the credit card fraud for which petitioner was convicted as to render Wilson's proffered testimony irrelevant.

Petitioner does not dispute the general rule that a defendant may not prove specific "good" acts as a basis for inferring that he acted in accordance with his character and, therefore, did not commit the charged act. Such evidence is simply not considered relevant. See, *e.g.*, *United States* v. *O'Connor*, 580 F. 2d 38, 43 (2d Cir. 1978) (evidence of defendant's not having received bribes from some meat packers inadmissible at trial on charges of his accepting bribes from other meat packers); *United States* v. *Benedetto*, 571 F. 2d 1246, 1249-1250 (2d Cir. 1978) (same); *United States* v. *Shapiro*, 159 F. 2d 890, 891 (2d Cir. 1947); *2 Weinstein's Evidence* 404-33 (1981).[4]

Rather, petitioner attempts to rely on cases that have recognized an exception to the general rule where the "other acts" the defendant offered to prove were part of the same

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[4]Even the cases on which petitioner relies (Pet. 19-20) recognize this general rule. See *United States* v. *Garvin*, 565 F. 2d 519, 521 (8th Cir. 1977); *Worthington* v. *United States*, 64 F. 2d 936, 940 (7th Cir. 1933).

or an identical scheme to that for which he was convicted. For example, the defendant in *United States* v. *Garvin*, 565 F. 2d 519 (8th Cir. 1977), was charged with defrauding an insurance company by not disclosing on his application for insurance his ownership of several additional insurance policies. In *Garvin*, the district court had permitted the government to introduce evidence that the defendant had as many as 18 insurance policies in effect at the time in question, notwithstanding the defendant's admission that he had other insurance in force at the time the alleged misrepresentations were made (*id.* at 521). In these circumstances, the court of appeals held that the district court erred in excluding evidence of the defendant's truthful responses to similar inquiries on the application for insurance relied on by the government and other applications for insurance filed by the defendant during the same time period.[5]

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[5]The court of appeals in *Garvin* expressly noted (565 F. 2d at 523) that the case against the defendant was "extremely marginal." It further stated (*id.* at 522) that it did not have to decide whether the exclusion of the defendant's "similar acts" evidence alone warranted reversal of his conviction, because the district court also had erroneously excluded the testimony of the defendant's expert witness.

The other cases on which petitioner relies also involve "other acts" by a defendant that were part of or identical to the scheme charged. See *United States* v. *Shavin*, 287 F. 2d 647, 652-654 (7th Cir. 1961) (attorney charged with mail fraud for falsely representing the amount of medical bills to insurance carriers against which the defendant's clients had claims should have been permitted to present evidence of instances in which he submitted true and accurate medical bills to the same insurance companies); *Watkins* v. *United States*, 287 F. 2d 932, 933-934 (1st Cir. 1961) (defendant charged with attempted tax evasion permitted to present evidence of the nature and extent of his dealings with one business, out of which arose some of the offenses charged, as well as the defendant's principal supplier); *Worthington* v. *United States*, 64 F. 2d 936 (7th Cir. 1933) (defendant charged with mail fraud arising out of an alleged scheme to sell worthless land contracts should have been permitted to show that, at about the same time, he sold other

The cases on which petitioner relies do not avail him, however, because the potential condominium deal was neither a part of, nor even similar to, the credit card scheme of which petitioner was convicted. Contrary to petitioner's assertion (Pet. 21), the district court clearly, and repeatedly, instructed the jury that the only scheme at issue involved the fraudulent use of credit card numbers (J.A. 476-477):

> Now, the crime of fraud by wire as it's referred to or by mail is complete if the proof shows that the defendant devised, as a part of the scheme, a method or mode of operation to obtain these credit card numbers by means of false representations or concealments or misrepresentations with the intent to use them. In other words, that's the scheme * * *.
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> * * * * *
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> The scheme here is alleged to have been, to be, that, as I said, by gimmick or trick or misrepresentations or concealment, that they are charged with having devised a plan to get the credit card number of these people by false, willful misrepresentations and to use it, see, with the intent to deceive or cheat. In other words, that's the gravamen or part of the alleged complaint.

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land contracts covering lots in the same subdivision that did yield a valuable return).

United States v. *McClure*, 546 F. 2d 670 (5th Cir. 1977), on which petitioner also relies (Pet. 20), involved an entrapment defense to a charge of selling heroin. There, the court of appeals held that the district court had erred in excluding evidence proffered by the defendant to the effect that the informant who had allegedly induced him to make the heroin sales also had coerced others into selling heroin (546 F. 2d at 672-673). The court explained (*ibid.*) that "evidence of a systematic campaign of threats and intimidation against other persons is admissible to show lack of criminal intent by a defendant who claims to have been illegally coerced." Here, of course, there is no such claim of entrapment.

See also J.A. 484. By contrast, the potential condominium deal did not contemplate the use of credit cards (J.A. 335-339). Accordingly any failure by petitioner to attempt to defraud the owners of the condominium units has no bearing on his intent to defraud others in the ongoing credit card scheme.

In addition, although Wilson would have been petitioner's only witness (petitioner himself did not testify), petitioner's co-defendant presented evidence designed to refute the charge of fraudulent intent. She testified that Appliance Underwriters was a legitimate business, but that some potential customers' credit card accounts had been mistakenly charged without authorization (J.A. 382). She further testified that a list she had prepared represented the names of individuals who had requested and received refunds on their improperly charged accounts (J.A. 375-376).

In any event, in view of the strong case against petitioner on the one count on which he was convicted, it can safely be said that petitioner was not harmed by the exclusion of Wilson's testimony. Count 7 charged petitioner with defrauding Debra Valles (J.A. 15-16). Valles testified that she telephoned Appliance Underwriters in response to a television commercial. After speaking with one woman and two men, one of the men told her about a promotional contest whereby she could win a prize if she had an identification number that matched a certain, undisclosed number. Valles gave the man her Master Charge number to determine if she had won a prize. Although she did not authorize Appliance Underwriters to charge her Master Charge account, the account was charged. Valles stated that she tried unsuccessfully several times to get a refund from Appliance Underwriters (J.A. 228-235). In view of this evidence, combined with co-conspirator Moffitt's detailed description of the

execution of the credit card scheme (see pages 2-3, *supra*), the exclusion of the proffered testimony could not have prejudiced petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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